



March 23, 2017

The Honorable Michael E. Horowitz
Inspector General
Office of the Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W
Suite 4706
Washington, DC 20530

BY FAX: (202) 616-9881

RE: Avoiding Interference in Pending Antitrust Litigation

Dear Inspector General Horowitz:

We write to you about potential challenges to the integrity of the Department of Justice's ongoing litigation concerning the proposed Anthem-Cigna merger. As you may know, the Department and several states sued to block this merger, and after a lengthy trial the federal district court in Washington enjoined the merger. Recent news reports, however, raise substantial concerns about potential improper communications or political interference with the Department's ongoing handling of this matter. Such contacts or interference could violate the decades-old policy of restricting contacts between the White House and the Department of Justice ("DOJ" or the "Department") regarding specific legal and enforcement actions. These issues go to the heart of the Department's obligation of evenhanded application of the law, and so fall squarely within your office's jurisdiction.

The Department of Justice's Mission Statement includes a commitment "to ensure fair and impartial administration of justice for all Americans." Evenhanded treatment under the law is a bedrock principle of our democracy. The American people depend on the Department to enforce our federal laws equally as to all parties, regardless of those parties' size, influence, or political connections. It would seriously undermine the rule of the law if the President or his

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political advisors were to direct or encourage the Department to alter course in an ongoing enforcement or litigation matter in order to benefit a political ally — just as it would were the President to direct a new enforcement action against a political opponent. The Department must be able to maintain public confidence in the fundamental integrity of justice, and political influence that casts that into question activates an urgent duty for the Office of Inspector General to identify such misconduct and respond to it.

To that end, for more than 40 years since Watergate, administrations of both political parties have established and enforced written policies to ensure that the DOJ impartially exercises its law enforcement powers by restricting the Department's contacts with the White House. These contacts policies have consistently set forth that communications between the White House and DOJ about any ongoing case, investigation, or adjudicative matter should take place only when necessary for the discharge of the President's constitutional duties and must be appropriate from a law enforcement perspective.¹ Also, both the White House and DOJ policies designate a small number of high-level officials who are permitted to contact each other in this sensitive area to ensure that, when such communications are necessary, they are appropriate.²

The longstanding policies restricting contacts between the White House and DOJ are most important in the context of enforcement and litigation actions involving specific parties. To help educate the public and reinforce the importance of the contacts policies to the rule of law, our organization, United to Protect Democracy, published a memo earlier this month describing the contacts policies of previous Democratic and Republican Administrations.³

In the context of the Anthem-Cigna litigation, after the court ruled in favor of the Department of Justice to block the merger, Anthem's counsel told the court that it expected to get another opportunity to clear the merger because of the new Administration. Subsequently, its CEO received an audience with President Trump. Troublingly, Anthem has made statements that indicate an expectation that political officials in the new Administration either have directed or will direct a shift in DOJ's legal judgment away from defending its victory and maintaining its position in this matter. Last month, in a teleconference with the court, Anthem argued one "pathway" the merger could go forward would be "through resolution with a new DOJ."⁴ As Anthem stated: "There's reasons that we believe the merger is still able to clear. Notably, now

¹ See Eric Holder, *Communications with the White House and Congress*, Memorandum for Heads of Department Components and All U.S. Attorneys, May 11, 2009, <https://lawfare.s3-us-west-2.amazonaws.com/staging/2017/2009%20Eric%20Holder%20memo.pdf> ("Holder Memo"); Michael B. Mukasey, *Communications with the White House*, Memorandum for Heads of Department Components and U.S. Attorneys, Dec. 19, 2007, available at <https://assets.documentcloud.org/documents/3371650/Mukasey-12-19-07.pdf> ("Mukasey Memo").

² Id.; see also Kathryn Ruemmler, *Prohibited Contacts with Agencies and Departments*, Memorandum for All White House Office Staff, March 23, 2012 ("Ruemmler Memo").

³ Memo from United to Protect Democracy to Interested Parties, *White House Communications with the DOJ and FBI*, Mar. 8, 2017, at <https://unitedtoprotectdemocracy.org/agencycontacts/> ("UPD Contacts Memo").

⁴ Anthem, Inc. v. Cigna Corp., Transcript of Teleconference re Plaintiff's Motion for a Temporary Restraining Order and the Court's Ruling, Feb. 16, 2017, Statement by Glenn Kurtz, p. 7 at 19, <https://www.ismanet.org/pdf/news/2017-2-8%20Letter%20to%20Snyder%20re%20Anthem%20Cigna%20DOJ.pdf>

Vice President Pence was supportive of the transaction as the governor of Indiana.”⁵

Public reports raise substantial concerns that Anthem may be obtaining the political interference that it seeks to alter the Department’s position in this specific litigation and enforcement action. Last week, according to the White House, Anthem’s CEO Joseph Swedish spoke by phone to President Donald Trump.⁶ In addition, Makan Delrahim, a senior official in the White House Counsel’s Office, was previously a lobbyist for Anthem who lobbied about this very merger.⁷ Now, reports have emerged indicating that Mr. Delrahim could be nominated to become head of the Antitrust Division, which has direct authority over the Department’s position in this action.⁸ While we expect that Mr. Delrahim would be recused personally from any involvement in this matter, his potential nomination raises serious questions about discussions between the White House and the Department regarding the Department’s position in this case.

The chronology of political involvement in the Anthem-Cigna matter is beginning to resemble an earlier, infamous DOJ antitrust merger matter involving International Telephone and Telegraph (ITT). In 1971, DOJ filed antitrust suits against ITT in order to block several mergers that it concluded violated our antitrust laws. In 1971, ITT pledged \$400,000 to the Republican National Committee to support the 1972 political convention; within days of that pledge, a settlement was announced. During confirmation hearings before the Senate Judiciary Committee on his nomination to be Attorney General, then Deputy Attorney General Richard Kleindienst denied talking to President Nixon about the ITT case before settlement. The Nixon White House tapes ultimately revealed an April 1971 conversation between President Nixon and Kleindienst during which Nixon ordered Kleindienst to drop the ITT suit. In early 1974 Kleindienst pleaded guilty to the misdemeanor charge of failing to testify accurately before the Senate during his confirmation hearings.

The questions surrounding the Department’s handling of the *ITT* matter undermined public confidence in the integrity of antitrust enforcement. That led directly to passage of the Tunney Act, which requires that consent decrees proposed by the Department in antitrust cases be subject to public comment and judicial review. Importantly, the Tunney Act requires disclosure of all contacts between settling defendants and any officer or employee of the United States other than communications between counsel of record alone and the Department of

⁵ Id. at 7, lines 21-24.

⁶ Press Briefing by Press Secretary Sean Spicer, Mar. 13, 2017, at <https://www.whitehouse.gov/the-press-office/2017/03/14/press-briefing-press-secretary-sean-spicer-3142017-23>. The Secretary of Health and Human Services, Dr. Tom Price, was also present for the call.

⁷ Additionally, to avoid undermining the DOJ’s impartial approach to this litigation, if the President were to appoint Makan Delrahim as head of the antitrust division, Mr. Delrahim should publicly recuse himself from this matter because of his prior position as an Anthem lobbyist working on the Cigna merger. See Lobbying Report, Jan. 20, 2016, <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=D4ECBE8B-1C02-4E0D-A588-8EECFCE8B15F&filingTypeID=78> (Lobbying for “antitrust issues associated with Anthem’s proposed acquisition of Cigna.”). Mr. Delrahim has recently been installed as Deputy Assistant to the President and Deputy Counsel.

⁸ Diane Bartz and Svea Herbst-Bayliss, “Exclusive: Delrahim to Head Justice Department’s Antitrust Unit - Sources,” *Reuters* (Mar. 17, 2017), <http://www.reuters.com/article/us-usa-trump-antitrust-exclusive-idUSKBN16O2O2>.

Justice.⁹

We are concerned that Administration officials may have engaged in inappropriate conduct regarding the Anthem-Cigna litigation by allowing Presidential communication about this very matter with the Anthem CEO, who has been a significant campaign contributor to Republican causes, and by potentially nominating a lobbyist who worked on this matter to run the Antitrust Division. For example, we cannot help but suspect that this matter may have arisen during discussions between the White House and Justice Department about the potential nomination of Mr. Delrahim. Were the White House to engage in any contacts with DOJ about this ongoing antitrust enforcement matter, it would substantially undermine Americans' confidence in the Department's commitment to equal justice under law.

Furthermore, a change in the Department's position as a result of political interference could implicate standards of ethical conduct for employees of the executive branch and other rules of professional conduct, and could be the basis for a referral to the Office of Professional Responsibility.

Our concern is heightened given the fact that, as we noted in the memo we released last week, the White House appears to have already engaged in several contacts with the Department of Justice in just the first forty days of the Administration that may have been in violation of the decades-old contact policies.¹⁰ A complaint that the White House Chief of Staff Reince Priebus may have violated these policies by seeking the FBI's assistance to attempt to refute news reports of communications between Russian intelligence and Trump campaign advisors¹¹ has already been brought to your attention.¹² Since the release of our memo, another questionable contact has already transpired: the President's reported call to the U.S. Attorney for the Southern

⁹ See The Antitrust Procedures and Penalties Act (known as the Tunney Act), 15 U.S.C. Sec. 16(g).

¹⁰ See UPD Contacts Memo at 3. First, news reports indicated that White House Counsel Donald McGahn attempted to access a surveillance order on Mr. Trump and others issued by the Foreign Intelligence Surveillance Court, though a White House official later attempted to recharacterize that effort. Michael D. Shear and Michael S. Schmidt, *Trump, Offering no Evidence, Says Obama Tapped His Phones*, N.Y. Times (March 4, 2017), https://www.nytimes.com/2017/03/04/us/politics/trump-obama-tap-phones.html?_r=0. Secondly, White House Senior Policy Adviser Stephen Miller, who is not part of the Counsel's office, reportedly called the U.S. Attorney for the Eastern District of New York at his home to direct the argument for defending the travel ban. Harry Siegel, *Stephen Miller Called Brooklyn U.S. Attorney At Home and Told Him How To Defend Travel Ban in Court*, NY Daily News (Feb. 18, 2017), <http://www.nydailynews.com/opinion/stephen-miller-called-u-s-attorney-travel-ban-defense-article-1.2975873>. Third, White House Chief of Staff Reince Priebus reportedly requested FBI Deputy Director Andrew McCabe to refute news articles about communications between Russia and Trump campaign advisors during the presidential campaign. Brian Naylor, *White House Asked FBI To Publicly Refute Reports Trump Associates Had Russia Contacts*, NPR (Feb. 24, 2017), <http://www.npr.org/2017/02/24/517011779/white-house-asked-fbi-to-publicly-refute-reports-trump-associates-had-russia-con>

¹¹ Isaac Arnsdorf, *Priebus Talk with FBI Appears to Break White House Rules*, Politico, (Mar. 17, 2017) <http://www.politico.com/story/2017/03/reince-priebus-fbi-discussion-white-house-rules-236192>

¹² See Letter from Noah Bookbinder, Executive Director, Citizens for Responsibility and Ethics in Washington to Michael E. Horowitz, Inspector General, U.S. Dept. of Justice, Feb. 24, 2017, available here: <http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/02/24192302/DOJ-IG-Priebus-McCabe-2-24-17.pdf>

District of New York, Preet Bharara.¹³ Mr. Bharara declined to return that call on the advice of DOJ leadership because of its apparent impropriety under the policy.¹⁴ Taken together, the White House's conduct in these situations undermines the importance of adhering to long-standing policies restricting White House interference in ongoing enforcement matters, potentially from the perspective of Department personnel on the receiving end of such contacts, and such interference causes substantial harm in the public's trust in the Department.

Accordingly, we ask the OIG to initiate an investigation to assess whether any improper communications between the White House and the Department have occurred or were attempted, in violation of the Department's policy and its mission "to ensure fair and impartial administration of justice for all Americans." Even if a contact was initiated from the White House, a DOJ recipient maintains obligations under DOJ's contacts policy to handle the communication in an appropriate manner, including possibly declining it or reporting it to relevant officials. We encourage you to investigate all forms of communication, including telephone calls via cell phone and text messages, which have been reported as the favored means of communication by senior White House advisors. The evidence to date detailed above suggests that if immediate steps are not taken, further violations could take place that would do grave harm to the American people's confidence in the Department.

We look forward to your response and thank you for your important work.

Sincerely,



Ian Bassin

Executive Director

Enc. United to Protect Democracy, Memo to Interested Parties, Re: White House Communications with the DOJ and FBI, March 8, 2017.

cc: Sen. Michael S. Lee, Chairman, Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights

Sen. Amy Klobuchar, Ranking Member, Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights

¹³ Eric Lichtblau and William K. Rashbaum, White House Addresses Trump's Unorthodox Call to Preet Bharara, NY Times (Mar. 12, 2017) available at <https://www.nytimes.com/2017/03/12/us/politics/white-house-addresses-trumps-unorthodox-call-to-preet-bharara.html>

¹⁴ Id.